U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE G. BLACKBURN and U.S. POSTAL SERVICE,
POST OFFICE, Pikeville, KY

Docket No. 02-886; Submitted on the Record;
Issued July 21, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant's employment-related cervical disc herniation at C5-6 and C6-7 caused disability for work on or after April 4, 1991.

On December 10, 1993 appellant, then a 44-year-old rural letter carrier, filed an occupational disease claim alleging that her osteoarthritis was a result of her federal employment. She stated that constant movements, turning her head and reaching, made the pain worse.[1] On December 17, 1993 appellant underwent an anterior C6-7 microdiscectomy and interbody fusion to treat a diagnosed herniated central and right C6-7 disc. She returned to work on February 14, 1994 without restrictions.

In a decision dated March 7, 1994, the Office of Workers' Compensation Programs denied appellant's claim for compensation. While the evidence of record supported the claimed event, incident or exposure occurring at the time, place and in the manner alleged, the Office found that the medical evidence failed to establish that the accepted factors caused appellant's neck condition. On June 30, 1994 and August 3, 1995 the Office denied modification of its March 7, 1994 decision.

Appellant filed a claim for a traumatic injury on June 21, 1995, which the Office accepted for acute cervical strain, resolved as of September 18, 1995. The Office noted that any continuing disability was related to her underlying condition.[2]

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[1] OWCP Case No. 060586216.

[2] OWCP Case No. 060628895. Appellant pulled on a bundle of catalogs from under a carrier's case. There was a pop in her neck with pain into her right shoulder and arm. On February 23, 1999 appellant filed a claim alleging that the June 21, 1995 incident was a recurrence of her original injury.

On January 26, 1996 appellant filed a second occupational disease claim alleging that her cervical disc disease with possible nerve compression was a result of her federal employment: "I am a rural letter carrier which requires constant movement of my arms and neck in the casing and delivering of my mail. I never had any of these problems until after my employment with the [employing establishment]."[3]

In a decision dated July 18, 1996, the Office denied appellant's claim on the grounds that the medical evidence failed to establish a causal relationship between the claimed condition or disability and factors of her employment. On January 16, 1998 an Office hearing representative set aside that decision, however, finding that the medical opinion evidence was sufficiently supportive of appellant's claim to require further development.

On June 24, 1998, after obtaining a second opinion, the Office accepted appellant's claim for the condition of cervical disc herniation at C5-6 and C6-7. Appellant filed claims for wage loss beginning April 4, 1991 and continuing.[4]

On February 1, 1999 the Office requested additional information, including properly completed claim forms with original signatures and an explanation of her "annual vacation" dates in early 1994. The Office advised: "Please be sure that all dates are substantiated by medical information keeping [appellant] off of work." The Office followed up on May 12, 2000 and provided appellant 30 days to submit the information requested.

Appellant, through her attorney, attempted to remedy these deficiencies and explained that she was seeking compensation for wage loss due to her work injury of March 1, 1991 and the escalation thereof on December 3, 1993.

In a decision dated July 10, 2000, the Office denied appellant's claim for wage loss beginning April 4, 1991. The Office found that appellant did not provide medical evidence to support the periods claimed and did not provide a detailed leave analysis. The Office noted that, although there was a leave analysis from December 3, 1993 through March 1, 1996, the breakdown revealed only periods of leave buyback, which appellant was not claiming and could not claim because she was separated from the employing establishment. Although another leave analysis covered the period January 31 through February 4, 1994 and indicated leave without pay (LWOP), there was no reasoned medical evidence to support that appellant was disabled for that period.

Appellant requested an oral hearing before an Office hearing representative, which was held on April 24, 2001. After the hearing, she submitted more recent medical records from her

[3] OWCP Case No. 060644575.

[4] The employing establishment terminated appellant's limited duty on January 12, 1996, as the acute cervical strain she sustained on June 21, 1995 had resolved. Appellant took disability retirement on June 10, 1996.

physician and a Social Security decision finding that on June 10, 1996 she met the disability insured status requirements of the Social Security Act.[5]

In a decision dated July 26, 2001, the hearing representative affirmed the Office's July 10, 2000 denial of appellant's claim for wage loss. The hearing representative found that there was no rationalized medical evidence in support of appellant's contention that her disability for the period April 4, 1991 and continuing was causally related to the accepted work injury.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.[6] The Board therefore has no jurisdiction to review appellant's initial occupational disease claim for osteoarthritis, which the Office last denied on August 3, 1995. The Board also has no jurisdiction to review appellant's claim for a traumatic injury on June 21, 1995, which the Office accepted for acute cervical strain, resolved as of September 18, 1995. The only decision the Board may review is the hearing representative's July 26, 2001 decision affirming the July 10, 2000 denial of appellant's claim for wage loss beginning April 4, 1991. The only issue before the Board is whether appellant's employment-related cervical disc herniation at C5-6 and C6-7 caused disability for work on or after April 4, 1991.[7]

The Board finds that appellant is entitled to compensation for disability resulting from her December 17, 1993 surgery.

A claimant seeking benefits under Federal Employees' Compensation Act[8] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[9] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[10]

The Office accepted appellant's second occupational disease claim for the condition of cervical disc herniation at C5-6 and C6-7. Appellant filed claims for wage loss covering the

[5] It is squarely settled by case precedent that a claimant's entitlement to benefits under the Social Security Act is not determinative of entitlement to benefits under the Federal Employees' Compensation Act. *E.g., Hazelee K. Anderson*, 37 ECAB 277 (1986) (a determination made for disability retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes, and the two relevant statutes have different standards of medical proof on the question of disability).

[6] 20 C.F.R. § 501.3(d) (time for filing an appeal); *see id*. § 501.10(d)(2) (computation of time).

[7] The issue in this case is not whether appellant's underlying, preexisting disease process is employment related. The Office adjudicated that issue in appellant's first occupational disease claim and afforded appellant avenues of appeal, which she pursued until the Office's last decision on August 3, 1995. Appellant may not circumvent those avenues of appeal by attempting to resurrect this issue in the guise of a new occupational injury. She may continue to pursue the issue, of course, but only within the confines of the appeal rights afforded by the Office's August 3, 1995 decision.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[10] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

entire period from April 4, 1991 and continuing. She therefore has the burden of proof to establish that any wage loss after April 4, 1991 is causally related to her cervical disc herniation at C5-6 and C6-7.

The record establishes that appellant underwent surgery on December 17, 1993 for an anterior C6-7 microdiscectomy and interbody fusion to treat her diagnosed herniated central and right C6-7 disc. The Office subsequently accepted that appellant's cervical disc herniation at C6-7 was employment related. Moreover, on March 26, 1998 Dr. Hossein Sakhai, a neurosurgeon and Office second opinion physician, reported that the cervical surgery performed on December 17, 1993 was medically necessary and related to the injury she described at work.[11] The evidence therefore establishes that appellant is entitled to compensation for disability resulting from this surgical procedure. The Board will set aside the Office's July 26, 2001 decision on this issue and remand the case for a determination of the period of disability resulting from the surgery and for the payment of appropriate compensation.[12]

The Board also finds that the medical opinion evidence is insufficient to establish that appellant's employment-related cervical disc herniation at C5-6 and C6-7 otherwise caused disability for work on or after April 4, 1991.

Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.[13]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[14] The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[15]

Appellant's burden of proving that she was disabled on particular dates can be met by less-than-definitive medical evidence and without a requirement of examination on each day of claimed disability. The Board, however, will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability

[11] *See* 5 U.S.C. § 8103(a) (the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies, prescribed or recommended by a qualified physician, that the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of any monthly compensation).

[12] Appellant provided the Office with an itemized breakdown of leave from December 3, 1993 to February 12, 1994, including 15 days of LWOP. The record indicates that appellant returned to work on February 14, 1994.

[13] *Edward H. Horton*, 41 ECAB 301 (1989).

[14] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[15] *John L. Clark*, 32 ECAB 1618 (1981).

for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[16]

Appellant provided the Office with an itemized breakdown of leave from January 16 to March 1, 1996, including 2 days (10 hours) of LWOP. The breakdown was not certified by the employing establishment, and appellant does not appear to have provided this breakdown to her physician. Appellant submitted no medical opinion evidence stating that she was totally disabled for work on specific dates of LWOP because of findings related to her cervical disc herniation at C5-6 or C6-7.[17]

The January 19, 1996 statement of Dr. Cyndi Evans, an employing establishment physician, that appellant "really should not go back to the rural carry route because of danger to herself and others if she develops further pain" is of little probative value. The Board has held that fear of future injury, or fear of a recurrence of disability if the employee returns to work, is not compensable; there must be medical evidence showing that a claimant is currently disabled for work due to an employment-related condition.[18] The Office did not accept appellant's preexisting condition as work related and Dr. Evans reported that it was very difficult to tell whether appellant's problems were work related or not. The June 30, 1996 statement of Dr. Joseph H. Rapier, Jr., an orthopedic surgeon, that he did not think appellant could return to the type of work she was doing before is also of little probative value because he did not attribute this disability to the accepted cervical disc herniation at C5-6 or C6-7. On July 30, 1998 Dr. Larry B. Coleman, appellant's physician, indicated that appellant was totally disabled for work beginning in June 1996, but he did not attribute this disability to a cervical disc herniation at C5-6 or C6-7.

Without a narrative medical opinion directly addressing the specific dates for which appellant may seek compensation for wage loss[19] and noting how clinical findings related to her cervical disc herniation at C5-6 or C6-7 caused disability for work on those dates, the evidence in this case fails to discharge appellant's burden of proof to establish that her accepted condition otherwise caused disability for work on or after April 4, 1991.

[16] *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[17] Disability caused by appellant's underlying or preexisting medical conditions, whether osteoarthritis or degenerative changes or spurring or stenosis, is not payable under her second occupational disease claim.

[18] *William A. Kandel*, 43 ECAB 1011 (1992); *Mary A. Geary*, 43 ECAB 300 (1991). Dr. Sakhai similarly reported that appellant would be unable to work as a Rural Mail Carrier because it was reasonable to believe that lifting and movement of the neck may aggravate her condition.

[19] The physician need not itemize each of the dates claimed if he or she has reviewed a certified leave breakdown.

The July 26, 2001 decision of the Office of Workers' Compensation Programs is set aside on the issue of disability resulting from the December 17, 1993 surgery and is otherwise affirmed.

Dated, Washington, DC
July 21, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member